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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 825

JOHN O'C. FITZGERALD,

Petitioner,

vs.

MICHAEL L. IGOE, as Judge of the United States District Court, Northern District of Illinois, Eastern Division; EDWIN A. ROBSON, as Judge of the United States District Court, Northern District of Illinois, Eastern Division; and any Judge of the United States District Court, Northern District of Illinois, Eastern Division, to whom the case of United States of America vs. John O'C. FitzGerald, No. 60 CR 188, pending in the United States District Court, Northern District of Illinois, Eastern Division, may be assigned from time to time,

Respondents.

REPLY TO BRIEF OF THE UNITED STATES.

JOHN O'C. FITZGERALD, *Pro Se,*
Petitioner,

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THE DARNELL-GARNER PRINTING COMPANY, CHICAGO

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REPLY TO BRIEF OF THE UNITED STATES.

Petitioner calls this Court's attention to the following matters in the brief for the United States in opposition to the granting of a Writ of Certiorari.

1. The Government contends that no special circumstances exist which warrant the issuance of the writs requested in the Court below, and says that (Gov. Br., page 4):

> "If petitioner be convicted on retrial, and that conviction be affirmed, it would then be time enough to determine whether the merits of the district court order warranted review by this Court."

In taking this position, the Government treats too lightly the Petitioner's constitutional guaranty against double jeopardy which this Court has held bars a second trial for the same offenses. *United States* v. *Ball*, 163 U. S. 662, 669 (1895). If the Petitioner must await a second trial and a conviction before he can receive a determination by either the Court of Appeals or this Court on the merits of his plea of double jeopardy, he will be denied his constitutional right not to be tried a second time. Since even a reversal of such a conviction would not restore that constitutional right, the issuance of the writs requested prior to a second trial is the only adequate remedy available to the Petitioner.

In the recent case of *McCabe* v. *Bronx County Court*, 199 N. Y. S. 2d 241 (1960), a state court issued a Writ of Prohibition to protect a defendant from being tried a second time and clearly answered the question which is now before this Court (page 246):

> "The guarantee is that a person shall not be subject to the risk of a second trial. Nor may this protection be abridged or curtailed by holding that a defendant may assert it during any stage of the new trial. The immunity protects him against being subjected to another trial—any part of another trial. • • • Therefore, reason and logic indicate that it is permissible to raise the plea of double jeopardy, if a person chooses, before the commencement of another trial and in whatever forum is proper and available."

This important question of whether the merits of a plea of double jeopardy can be raised in a Court of Appeals or this Court prior to a second trial has not been decided by this Court. In the *Ball* case, the defendant had been retried before the question of double jeopardy was presented to this Court. However, in *Ex Parte Simons*, 247 U. S. 231, 239, 240 (1917), Mr. Justice Holmes said that the time for dealing with an order which wrongly deprived a party to a trial by jury was "now" prior to trial.

2. The Government concludes that the jury was discharged in the instant case because it was *unable to agree*. This is not in accordance with the facts.

On page 2 of the Government's brief in the second of the "Questions Presented," it says:

> "2. Whether, following the discharge of a jury *unable to agree*, petitioner could be retried without violating the double jeopardy prohibitions of the Fifth Amendment." (Emphasis added.)

To like effect, so far as is critical here is the last sentence of the Government's Argument (Gov. Br., page 5).

The jury, however, never said that they were *unable to agree*. To the contrary, their deliberations were sharply cut off by the Deputy Marshal without any request by them (Pet. Appendix, Exhibit I B, page 30).

Furthermore, on pages 2 and 3 of the Government's brief, it says:

> "Neither the presiding judge, petitioner, nor the attorneys were present at the time of the discharge (Pet. App. 31), but all were present the following morning in court when the Deputy Clerk announced that the case had ended with a hung jury (Pet. App. 32). The case was thereupon set for a new trial."

The fact relating to this statement is that the Deputy Clerk said:

> "We have a report, Your Honor, that the verdict was not rendered and the jury was hung."

This was said in the absence of the jury (Pet. Appendix, Exhibit I B, page 32) and it should not be concluded therefrom that the jury had in fact given up hope of agreeing.

The jury in the instant case was discharged not because it was *unable to agree* but because it failed to reach a verdict by a time which was arbitrarily set in advance by the

Presiding Judge (Pet. Appendix, Exhibit I B, pages 30 and 31).

3. Finally, the Government apparently believes that the Petitioner waived his constitutional guaranty against double jeopardy in that he offered no objection to the improper and illegal manner in which the jury was discharged without a verdict (Gov. Br., page 5). The Government cited no authority for its position. While this Court has not ruled explicitly on this question, it has held that a strong presumption is raised against the waiver of fundamental constitutional rights by an accused. *Von Moltke* v. *Gillies*, 332 U. S. 708, 723 (1948); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Other courts, however, have held that the mere silence of an accused or his failure to object to a discharge of a jury cannot amount to a waiver of his immunity from being tried a second time. *Himmelfarb* v. *United States*, 175 F. 2d 924, 931, fn. 1 (9th Cir. 1949); *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606 (1935); and *People Ex Rel. Stabile* v. *Warden*, 124 N. Y. S. 341 (1910).

Respectfully submitted,

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